

**DRAFT PROGRAMMATIC AGREEMENT AMONG THE U.S.
ENVIRONMENTAL PROTECTION AGENCY (EPA), THE
ADVISORY COUNCIL ON HISTORIC PRESERVATION (ACHP),
AND THE FLORIDA DIVISION OF HISTORICAL RESOURCES-
STATE HISTORIC PRESERVATION OFFICER (FLORIDA SHPO)
REGARDING THE SECTION 106 PROCESS FOR THE EPA'S
APPROVAL OF THE STATE OF FLORIDA'S REQUEST TO
ASSUME A CLEAN WATER ACT (CWA) SECTION 404
PERMITTING PROGRAM**

WHEREAS, the EPA is the federal agency responsible for administering compliance with, and enforcement of, the CWA (33 U.S.C. §§ 1251 et seq.); and

WHEREAS, 33 U.S.C. § 1344(g) and 40 C.F.R. Part 233 provide for a state or a tribe to administer its own permit program for the discharge of dredged or fill material into waters of the United States, other than those waters that the CWA reserves as subject to U.S. Army Corps of Engineers jurisdiction; and

Commented [A1]: Federally-recognized tribe

WHEREAS, the state of Florida has submitted to the EPA a complete request to administer a permit program for discharges of dredged or fill material into waters of the United States assumed by the state pursuant to CWA Section 404(g)(1), not including discharges to waters in Indian eCountry as defined at 18 U.S.C. Section 1151; and

WHEREAS, EPA has initiated consultation in accordance with Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended, and its implementing regulations at 36 C.F.R. Part 800 regarding EPA's decision on Florida's request to assume the CWA Section 404 program in waters within the state pursuant to Section 404(g)(1); and

WHEREAS, a programmatic agreement is appropriate pursuant to 36 C.F.R. § 800.14(b)(1)(ii) because effects on historic properties cannot be fully determined prior to approval of Florida's assumption of the CWA 404 permitting program; and

WHEREAS, this Programmatic Agreement (hereinafter the "PA"), including its Appendix A, serves as a tool which sets forth a process to assure compliance with Section 106 of the NHPA in connection with the EPA's program assumption decision, enhances coordination on the consideration of potential impacts on historic properties, seeks value-added outcomes from the Section 106 process, and provides a comprehensive process for resolution of disputes concerning effects determinations or resolution of adverse effects associated with state-issued 404 permits by utilizing the EPA's existing permit review framework under 40 C.F.R. § 233.50; and

Commented [A2]: Should mention what Appendix A is here.

Commented [A3]: SHPO should be spelled out when it is first mentioned in the PA. I see SHPO in the title but it says 'Florida SHPO'. Terms need to be consistent. Do you want to say Florida SHPO or SHPO, pick your preference.

WHEREAS, the role of Florida SHPOs under Section 106 of the NHPA and 36 C.F.R. Part 800 is to advise, assist, review and consult with federal agencies as they carry out their historic

Commented [A4]: Similar statement should be made about the role of the THPO (Tribal Historic Preservation Officer). Consider adding a WHEREAS that will outline the THPO role under Section 106 of the NHPA.

preservation responsibilities and respond to requests within a specified period of time; and the Florida SHPO reflects the interests of Florida and its citizens in the preservation of the state's cultural heritage; and

WHEREAS, the Florida SHPO will advise and assist the FDEP with carrying out its historic preservation responsibilities under the Florida Historical Resources Act; and

WHEREAS, to effect a proper and comprehensive review of the effects of state 404 permit actions on historic properties, on August 6, 2020, FDEP and the Florida SHPO entered into an operating agreement "Operating Agreement between the Florida Department of Environmental Protection and the Florida Division of Historical Resources – State Historic Preservation Officer regarding the State 404 Program" (hereinafter "August 6, 2020 OA") (the August 6, 2020 OA is attached to this PA as Appendix A); and

WHEREAS, the EPA consulted with the ACHP pursuant to 36 C.F.R. § 800.14(b), and the ACHP is a signatory to this PA; and

WHEREAS, the EPA consulted with FDEP and the Florida SHPO pursuant to 36 C.F.R. § 800.14, and the Florida SHPO is a signatory to this PA; and

WHEREAS, the EPA invited the following eight federally recognized Indian tribes to consult: the Alabama-Coushatta Tribe of Texas; the Choctaw Nation of Oklahoma; the Coushatta Tribe of Louisiana; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek Indians; and the Seminole Tribe of Indians of Florida ; and

WHEREAS, based on the responses received from the eight Indian tribes that the EPA contacted, the EPA consulted with the Choctaw Nation of Oklahoma; the Miccosukee Tribe of Indians of Florida; the Muscogee (Creek) Nation, the Poarch Band of Creek Indians; and the Seminole Tribe of Florida pursuant to 36 C.F.R. § 800.14; and

WHEREAS; the EPA has sought comment from the public regarding the identification and protection of historic properties and has taken any comments received into account; and

WHEREAS, nothing in this PA absolves the EPA or FDEP from the requirements for federal review of individual permit applications and draft general permits pursuant to Section 404 of the CWA, 40 C.F.R. Part 233, and the July 31, 2020 Memorandum of Agreement Between the Florida Department of Environmental Protection and the United States Environmental Protection Agency (FDEP-EPA MOA).

NOW, THEREFORE, the EPA, the ACHP, and the Florida SHPO mutually agree that the EPA, consistent with the provisions of this PA below, will meet its responsibilities under the NHPA through this PA as provided for in 36 C.F.R. § 800.14(b), rather than following the procedure set forth in 36 C.F.R. §§ 800.3 through 800.7.

Commented [A5]: This needs to be spelled out when first introduced or mentioned.

Commented [A6]: Please provide Tribal Consultation details relating to the OA. When was this document sent to tribe for review and consultation? Which tribes provided feedback? How was EPA involved in the OA? Is the OA finalized? If so, was it finalized on Aug 6th, 2020?

The EPA did not consult with the Muscogee (Creek) Nation concerning this project until October 15, 2020 where, on a phone call, we were first told about the OA and PA and the EPA's timeline. Due to this, we did not have 30 days to review and make comments on the OA, but MCN did their due diligence and sent off comments on November 2, 2020. Since then, we have received no replies or answers to the questions we made on the OA document from the EPA. Then, on November 25, 2020, the Muscogee (Creek) Nation is sent an email with a draft PA. Within it, the August 6, 2020 OA is mentioned as being incorporated, which is months before we were notified concerning this project and before we made comments on the OA. On December 2, 2020, there is a scheduled call with the ACHP, EPA, and Federally-Recognized Tribes where, again, we are told that we have to have our comments in on the PA by December 4th. Again, not afforded a 30-day review. The EPA is required under Section 106 to consult with Tribes and with something as important as taking control of the 404-program in Florida, the MCN was never afforded the opportunity to be properly consulted with. The EPA has continually pushed to meet their deadlines and their actions show the Tribes that they have no concern for th...

Commented [A7]: Why did EPA wait so long to give Tribes a draft PA for them to review? We know that ACHP received the Draft PA on Oct 21, 2020. Tribes received the PA on November 25th, one day before Thanksgiving and were asked to meet one week later for consultation. There has not been enough time for all parties who have interest and obligations under Section 106 to consulting meaningfully on this undertaking.

Commented [A8]: What about the Seminole Nation of Oklahoma? Why would they be left out?

Commented [A9]: There needs to be another WHEREAS that states the role of the tribes in the agreement. We are not the public. We are sovereign nations and deserve to be invited as a concurring party or an invited signatory to this agreement. Tribes who own lands in FL should be offered signatory status in our opinion.

Commented [A10]: What about NAGPRA compliance?

We generally suggest that you try to avoid removing and curating unmarked burials, especially those of likely Native Americans. If you are a NAGPRA reporting institution, you must comply with NAGPRA regulations for any remains or associated grave goods that you take into your possession (visit the [HYPERLINK "http://www.nps.gov/nagpra/" "http://www.nps.gov/nagpra/"] for more information). Additionally, pursuant to...

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STIPULATIONS

The EPA, in coordination with the Florida SHPO, shall ensure that the following stipulations are carried out:

I. DEFINITIONS

- a. All the definitions in 36 C.F.R. Part 800, Subpart B – The Section 106 Process – are applicable and incorporated herein.
- b. All the definitions in 36 C.F.R. Part 800, Subpart C – Program Alternatives – are applicable and incorporated herein.
- c. All the definitions in 40 C.F.R. Part 233 are applicable and incorporated herein.
- d. Additional definitions and terms that are defined in the August 6, 2020 OA found in Appendix A are applicable and incorporated herein.

II. RELEVANT ENTITIES

- a. Parties to the PA

- (1) U.S. Environmental Protection Agency. The EPA is the federal agency responsible for administering compliance with, and enforcement of, the CWA. The EPA is responsible for ensuring that the EPA's program assumption decision made pursuant to Section 404(g)(1) of the CWA complies with Section 106 of the NHPA, and its implementing regulations at 36 C.F.R. Part 800.

The EPA has oversight authority over the state CWA 404 program and may review state CWA 404 individual permit applications and draft general permits. Pursuant to Section 404(j) of the CWA and 40 C.F.R. § 233.50, the EPA may in its discretion comment upon, object to, make recommendations, or take no action with respect to a state CWA 404 individual permit application, draft general permit, or a state's failure to accept the recommendations of another state or Indian tribe whose waters may be affected by the issuance of a permit. Any such objection shall be based on the EPA's determination that the proposed permit is: (1) the subject of an interstate dispute under 40 C.F.R. § 233.31(a); and/or (2) outside the requirements of the CWA, the regulations at 40 C.F.R. Part 233, or the CWA Section 404(b)(1) Guidelines, which also address impacts to historic properties.

Commented [A11]: EPA may review or will review state CWA 404 permits and draft general permits?

- (2) State Historic Preservation Officer. The Florida SHPO reflects the interests of the state of Florida and its citizens in the preservation of the state's cultural heritage.

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The Florida SHPO will advise and assist the FDEP with carrying out its historic preservation responsibilities. The SHPO has advised and assisted the EPA in developing this PA to carry out its responsibilities to comply with Section 106 of the NHPA.

- (3) Advisory Council on Historic Preservation. The ACHP promotes the preservation, enhancement, and sustainable use of our nation's diverse historic resources, and advises the President and the Congress on national historic preservation policy. The ACHP advised and assisted the EPA with carrying out its historic preservation responsibilities pursuant to Section 106 of the NHPA and its implementing regulations at 36 C.F.R. Part 800.

b. Other Entities that Participated in Consultation

- (1) Indian tribes. Indian tribes mean an Indian tribe, band, nation, or other organized group or community including a Native village, Regional Corporation or Village Corporations, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (54 U.S.C. 300309). The state 404 assumption does not include waters in Indian country, as that term is defined in 18 U.S.C. § 1151.
- (2) Public. The views of the public are beneficial to informed decision-making in the historic properties review. The EPA sought and considered the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, and confidentiality concerns of private individuals and businesses.
- (3) Florida Department of Environmental Protection. FDEP is the state agency responsible for administering the state CWA 404 program in state-assumed waters, which includes the authority to grant or deny applications for state CWA 404 program permits.

III. NHPA IMPLEMENTATION AND ADOPTION OF THE AUGUST 6, 2020 OA

FDEP and the Florida SHPO established in the August 6, 2020 OA procedures for the review of proposed permits under the state 404 program to determine whether the proposed projects are likely to have an adverse effect on properties listed, or eligible for listing, on the National Register of Historic Places. The August 6, 2020 OA provides a detailed description of the historic properties review process, including but not limited to: 1) the duties and responsibilities of FDEP and the Florida SHPO; 2) the procedures for consultation and public notice; 3) the effects determination and resolution of adverse effects; 4) federal review; 5) unanticipated discovery procedures; and 6) training requirements. This PA adopts the August 6, 2020 OA and its procedures and incorporates them herein. The Florida SHPO may amend or terminate the August 6, 2020 OA if all signatories to this PA agree. In such an event, the PA shall be amended or terminated accordingly pursuant to the terms set forth below.

Commented [A12]: This should be an appendix to the PA and attached. When was the OA finalized?

Commented [A13]: According to I.A.2.b.i. of the OA, the Florida Department of Environmental Protection, "shall consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an application." This conflicts with 36CFR 800.2(4), which indicates that federal agencies remain responsible for consultation with Tribes even when other NHPA Section 106 duties have been delegated. Executive Order 13175 and the ACHP's statement on "Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act" both affirm this responsibility on the part of federal agencies. A federal agency may delegate its government-to-government consultation responsibility towards a Tribe under the NHPA only with that Tribe's written consent. As this has not occurred, the EPA still has the responsibility of conducting government-to-government consultation with Tribes on these permits. This needs to be reflected in the OA and PA.

Commented [A14]: What about tribes? What about our comments on the OA?

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IV. EPA REVIEW

- a. Section III(C) of the August 6, 2020 OA provides for EPA review of permit applications in the following circumstances, which are consistent with EPA's state 404 permit review authorities under Section 404(j) of the CWA and 40 C.F.R. § 233.50, and with FDEP's discretion to request EPA review of specific projects that would otherwise not require EPA oversight pursuant to Section II(B) of the FDEP-EPA MOA. The circumstances are as follows:

- (1) FDEP shall send a copy of the public notice described in Section II.B. of the OA to the EPA in accordance with subsection 62-331.052(2), F.A.C., for those projects that are subject to federal review. Included in the list are projects within critical areas established under state or federal law, including sites identified or proposed under the NHPA;
- (2) FDEP agrees to request, in accordance with section 5.2.5 of the State 404 Program Applicant's Handbook, EPA review of an application under 40 C.F.R. § 233.50 where the parties consulting under the August 6, 2020 OA cannot agree on the effect determination for a proposed activity or where FDEP does not accept the recommendations of one of the parties consulting under the August 6, 2020 OA for the resolution of adverse effects; and
- (3) FDEP shall, in accordance with subsection 62-331.052(3)(b), F.A.C., notify the EPA if FDEP does not accept the effect determination for a proposed activity or recommendations for the resolution of adverse effects of a Tribal Historic Preservation Officer (THPO)/Indian Tribe, together with FDEP's reason for its decision.

Commented [A15]: As stated previously in comments we submitted to EPA, federally recognized tribe are not the public and its insulting to treat a sovereign nation like the public.

- b. The EPA may in its discretion review documentation submitted pursuant to subsection IV(a) of this PA and develop any comments, objections, or recommendations with respect to permit applications submitted pursuant to subsection IV(a)(1) that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to subsections IV(a)(2) or (3). The EPA will submit to the ACHP and Tribes a copy of the proposed comments, objections, or recommendations and other pertinent documentation. The EPA will also notify the state pursuant to 40 C.F.R. § 233.50(d) that it is reserving its right to comment. The ACHP, within 30 days of receipt of the EPA's proposed comments, objections, or recommendations and other pertinent documentation, may provide an advisory opinion regarding the proposed comments, objections, or recommendations. The EPA will consider, but need not follow, the ACHP's advisory opinion in finalizing its comments, objections, or recommendations with respect to the permit application. If the ACHP does not submit an advisory opinion within 30 days of receipt of the EPA's proposed comments, objections, or recommendations, and other pertinent documentation, the EPA will exercise its discretion to finalize its

Commented [A16]: We want to be consulted here. Please add Muscogee (Creek) Nation or 'Tribes' to this review consultation.

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comments, objections, or recommendations, or determine not to finalize such comments, objections, or recommendations. The EPA will transmit any final comments, objections, or recommendations to FDEP, Florida SHPO, and Tribes for resolution in accordance with 40 C.F.R. § 233.50.

V. CONFIDENTIALITY

All signatory parties to this PA acknowledge that information about Historic Properties, potential Historic Properties, or properties considered historic for purposes of the PA are or may be subject to the provisions of Section 304 of the NHPA. Having so acknowledged, all signatory parties to this PA will ensure that all actions and documentation prescribed by this PA are, where necessary, consistent with the requirements of Section 304 of the NHPA.

Commented [A17]: What about Tribes who are not signatories.....EPA has not allowed us a seat at the table. Confidentiality is a MAJOR concern for tribes

VI. REPORTING AND MONITORING

Florida shall provide the signatories and tribes with an annual report for each state fiscal year ending June 30th by September 30th of each year that the PA is in effect. This annual report will summarize the actions taken to implement the terms of this PA and provide data about the historic properties review process under the August 6, 2020 OA, and, if necessary, recommend any actions or revisions to be considered, including amendments to the PA.

The EPA will schedule a meeting to discuss issues identified in the annual report related to the PA and August 6, 2020 OA if any signatory or tribe requests one.

VII. AMENDMENT

Any signatory party to this PA may at any time propose amendments, whereupon all signatory parties shall consult to consider such an amendment for no more than 90 days. This PA may be amended only upon written concurrence of all signatory parties. The amended PA will be filed with the ACHP. If the EPA determines that a modification of Florida's CWA Section 404 program is warranted based on its review of annual reports submitted by FDEP pursuant to 40 C.F.R. § 233.52, or otherwise, the EPA will consider whether the PA needs to be amended at that time. Any amendment of this PA would not affect the EPA's approval of Florida's assumption of the CWA Section 404 program; amendments to this PA that may alter any aspect of Florida's approved program are not part of Florida's approved program unless and until approved pursuant to 40 C.F.R. § 233.16.

VIII. TERMINATION

- a. Any signatory party to this PA may terminate it by providing 90 days' notice to the other signatory parties, provided that the signatory parties will meet during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. If this PA is terminated, the EPA will either execute another programmatic agreement or seek, consider, and respond to the ACHP comments,

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which the ACHP shall transmit to the EPA within 45 days of request. The termination of this PA does not modify or alter the legal status of the assumed state program.

- b. This PA shall remain in effect unless and until program responsibilities are transferred by FDEP to the U.S. Army Corps of Engineers pursuant to 40 C.F.R. § 233.53, program approval is withdrawn pursuant to 40 C.F.R. § 233.53, or the PA is terminated by any signatory party.

SIGNATORY PARTIES

By: Mary S. Walker (DATE)
Administrator, EPA Region 4

By: Aimee K. Jorjani (DATE)
Chairman, Advisory Council on Historic Preservation

By: Dr. Timothy Parson (DATE)
Director and State Historic Preservation Officer

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